IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Exclusive Supplements, Inc.	:	
	:	**No.**
Plaintiff,	:	
	:	**(Electronically Filed)**
v.	:	
	:	**JURY TRIAL DEMANDED**
Heidi Somers and	:	
BPI Sports, LLC	:	
Defendants.	:	

COMPLAINT

Plaintiff, Exclusive Supplements, Inc., by and through its attorney, Michael E. Hughes, Esq., files this Complaint against Defendants, seeking injunctive and other relief, and in support thereof avers as follows:

JURISDICTION AND VENUE

1. This civil action is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. Thus, this Court has original jurisdiction under 28 U.S.C. § 1332(a)(1).

2. Venue in this district is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims occurred within this district.

3. This Court has personal jurisdiction over Defendants by virtue of their doing business in this Commonwealth and, in particular, within this judicial district.

PARTIES

4. Exclusive Supplements, Inc. ("Plaintiff" or "ESI") is a Pennsylvania Corporation with an address of 3000 Casteel Dr., Coraopolis, PA 15108.

5. Defendant Heidi Somers ("Somers") is an adult individual who, upon information and belief, resides at 8702 Village Dr., Unit 905, San Antonio, TX 78217.

6. Defendant BPI Sports, LLC ("BPI"), is a Florida Limited Liability Company with an address of 3149 SW 42nd St., Suite 200, Hollywood, FL 33312.

FACTS

Background

7. ESI markets, distributes, and sells dietary and other nutritional supplements and related products to consumers throughout the country.

8. ESI markets, distributes, and sells its products under various brand names such as "BioRhythm" and "Afterglow."

9. BPI markets, distributes, and sells dietary and other nutritional supplements and related products to consumers throughout the country.

10. Somers is a professional bodybuilder, bikini model, online fitness and bodybuilding coach, and a BioRhythm Spokesperson for ESI.

11. Somers maintains the following social media accounts: Youtube: user/heidisomers, Instagram: @BuffBunny, Facebook: HeidiSomersFit, Twitter: @ HeidiSomers (collectively referred to as "social media accounts").

12. Somers is an internet celebrity and her social media influence is impressive; she has approximately 195,000 followers on Instagram, 13,419 YouTube subscribers, 4,247 followers on Twitter followers, and 125,945 Facebook likes.[1]

13. Sponsors pay Somers to use her social media influence to promote their products.

[1] Current as of March 4, 2015, at approximately 8:30 p.m.

14. Somers uses her social media accounts to post videos and pictures in which she promotes her sponsor's products, her personal appearances at various fitness and bodybuilding competitions and events, and her own products such as her Buff Bunny Work Out/Meal Plans, and her Operation Booty workout series.

15. From approximately October 1, 2013 until approximately March 1, 2015, Somers exclusively endorsed ESI's products and did not endorse any competing products.

Product Endorsement Agreement

16. On or about October 1, 2013, ESI and Somers entered into a Product Endorsement Agreement (the "Agreement") (a copy of the Agreement is attached as Exhibit A)[2].

17. The Agreement was for a term of one year and was renewable in ESI's sole discretion for up to four additional one-year terms.

18. On or about August 27, 2014, ESI exercised its option to extend the Agreement for an additional one-year term.

19. Pursuant to the agreement, Somers agreed to render social media promotional services by making certain posts on her social media accounts as directed by ESI. See, Exhibit A ¶ 3.1

20. Pursuant to the Agreement, Somers agreed to work at least one industry show per quarter at ESI's request, with two (2) weeks' notice of the show. See, Exhibit A ¶ 3.2

21. Pursuant to the Agreement, Somers granted ESI the exclusive license to use her name, biographical material, still photographs, and likenesses to promote its products. See, Exhibit A ¶ 3.3

[2] A signed copy of the Agreement was unavailable at the time of filing of this Complaint. However, Somers has acknowledged the existence of this Agreement on several occasions via e-mail; and has appeared in numerous publications and made numerous posts on behalf of ESI. Copies of these e-mails and examples of her social media posts promoting ESI are attached as Exhibit B.

22. In accordance with the foregoing license, ESI used Somers' name, biographical material, photographs and likenesses in both print and internet advertising to promote its products.

23. The Agreement contains the following exclusivity clause:

> EXCLUSIVITY. Except for in connection with Somers's Services hereunder, during the Initial Term and any extensions thereof, Somers shall not promote, endorse or reference any other supplement brands and/or companies.
>
> See, Exhibit A ¶ 5

24. The Agreement contains the following indemnification clause:

> Somers shall indemnify and hold ESI[…] harmless from and against any and all liabilities, claims, costs, damages or expenses (including, but not limited to, reasonable outside attorneys' and reasonable outside accountants' fees and costs, whether or not in connection with litigation) (collectively, "Claims") arising out of, resulting from or relating to any material breach of any representation, warranty or agreement made by Somers in the Agreement.
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> See, Exhibit A ¶ 8.5

The Arnold

25. The Arnold Fitness EXPO ("the Arnold") is the nation's largest health and fitness exposition; it is an annual event that hosts the leading businesses and organizations in the fitness and nutritional supplement industry; and it showcases the latest trends in the supplement industry.

26. The Arnold takes place at the Greater Columbus (Ohio) Convention Center from Friday, March 6th, 2015, to Sunday, March 8th, 2015.

27. More than 175,000 people will attend the Arnold.

28. Attendance at trade show events is of paramount importance in ESI's industry; events such as the Arnold generate millions of dollars in revenue for ESI.

29. ESI will be an exhibitor at the Arnold; its exhibit will be at Booth 1653 (a map of this location is attached as Exhibit C).

30. BPI will be an exhibitor at the Arnold; its exhibit will be at Booth of 1619 (a map of this location is attached is Exhibit D).

31. On or about February 9, 2015, ESI informed Somers that she would be attending the Arnold to promote ESI.

32. On February 10, 2015, Somers confirmed that she would be attending the Arnold on behalf of ESI (a copy of the relevant e-mail exchange is attached as Exhibit E).

33. On or about February 11, 2015, ESI booked a flight for Somers to so that she could appear at the Arnold and represent ESI at Booth 1653.

Somers Switches Teams

34. On or about March 1, 2015, Somers informed her social media followers that she would be attending the Arnold; however, to the surprise of ESI, instead of posting that she would be representing ESI at Booth 1653, she posted that she would be appearing as a "BPI Sports Bombshell" at the nearby BPI booth.[3]

35. On or about March 1, 2015, Somers began promoting BPI on her social media accounts and ceased promoting ESI.

36. BPI directly competes with ESI in the supplement industry.

37. BPI targets the same consumers as ESI.

38. BPI and ESI will be operating booths within approximately 50 feet of each other at the Arnold.

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[3] Examples of these social media posts are attached as Exhibit F.

39. ESI will have products at its booth that feature Somers' likeness; Somers, however, will not be promoting these products, instead she will be promoting a competitor's products within eyesight of ESI's booth.

40. On March 4, 2015, in an attempt to avoid taking any legal action, ESI contacted Somers and BPI; Somers failed to respond and BPI direct all inquiries to its attorney.

41. Somers' last-minute decision to switch teams will cast ESI in a very negative light in the eyes of its target market not only during the Arnold, but also for the foreseeable future.

COUNT I
Exclusive Supplements, Inc. v. Heidi Somers
Breach of Contract

42. Plaintiff incorporates all preceding paragraphs as if set forth fully herein.

43. ESI and Somers entered into a valid and enforceable Product Endorsement Agreement.

44. ESI fully performed its contractual obligations.

45. Somers breached her contractual obligations by promoting the products of a direct competitor in violation of the exclusivity clause of the Agreement

46. Somers' breach will cause ESI to lose sales an amount that will easily exceed the $75,000 jurisdictional requirement.

47. Somers' last-minute decision to endorse ESI's competitor at the largest exposition and tradeshow in its industry was undertaken in such blatant and conscious disregard of ESI's contractual rights that it constitutes a willful and malicious breach that is exactly the type of outrageous conduct for which an award of punitive damages is required.

COUNT II
Exclusive Supplements, Inc. v. BPI Sports, LLC
Intentional Interference with Contractual Relations

48. Plaintiff incorporates all preceding paragraphs as if set forth fully herein.

49. BPI knew, or reasonably should have known, that Somers was contractually obligated to exclusively promote ESI's products.

50. BPI induced Somers to breach her contractual obligations and violate the exclusivity clause of her contract with ESI.

51. As a proximate cause of BPI's interference, ESI lost, and will continue to lose the customers and market share it derived from its association with Somers and her considerable and burgeoning social media influence.

52. As a result of BPI's interference, ESI been damaged in an amount to be proven at trial; and ESI has and will continue to incur significant losses caused by the last-minute defection of its spokesperson.

53. BPI's interference was willful, malicious, oppressive, and in conscious disregard of ESI's contractual rights; therefore it constitutes outrageous conduct that would support an award of punitive damages.

COUNT III
Exclusive Supplements, Inc. v. Heidi Somers
Unjust Enrichment

54. Plaintiff incorporates all preceding paragraphs as if set forth fully herein.

55. Somers received benefits from ESI, including but not limited to her flight to the Arnold.

56. Somers has accepted and retained these benefits; and will continue to retain these benefits.

57. In light of her unlawful conduct, it is unjust for Somers retain any of the benefits that she obtained from ESI.

COUNT IV
Exclusive Supplements, Inc. v. Heidi Somers and BP Sports, LLC
Emergency Temporary Restraining Order and/or Injunctive Relief

58. Plaintiff incorporates all preceding paragraphs as if set forth fully herein.

59. Somers is associated, both with the public and within the nutritional and fitness supplement industry, as a spokesperson for ESI.

60. Pursuant to the exclusive license set forth in the Agreement, ESI has used the likeness of Somers to promote its products.

61. ESI promoted Somers' appearance on their behalf at the Arnold and based its marketing strategy for the event around her attendance.

62. Somers last-minute decision to endorse a competitor's product at the Arnold has and will continue to cast ESI in a negative light.

63. Somers' intent to fly to the Arnold (using the ticket that ESI purchased) to promote a competitor's product, at a competitor's booth that is located within eyesight of ESI's booth, at which her likeness will be displayed, will cause harm to ESI of such nature that it its negative effect cannot be determined.

64. Defendants, individually and collectively, are acting in such a manner that makes Somers breach of the Agreement an ongoing violation that can only be remedied by equitable relief in the form of a Temporary Restraining Order.

65. Absent injunctive relief, Defendants will continue to engage in the unlawful acts.

66. Emergency temporary relief is required because the most egregious example of Somers' disregard for the Agreement, which will cause ESI to suffer irreparable harm, will occur

not less than one day from the date of the filing of this Complaint and the accompanying emergency motion.

67. ESI was unaware of Somers' decision to breach the Agreement and appear at the Arnold on behalf of BPI until approximately one day prior to the filing of this Complaint and the accompanying emergency motion; thus the emergency nature of this request was created solely by the Defendants' actions.

68. ESI will suffer immediate and irreparable harm if Somers appears at the Arnold as a spokesperson for BPI.

69. ESI has no plain, speedy, or adequate remedy at law; therefore the following injunctive relief is appropriate:

a. An immediate Temporary Restraining Order barring Somers from appearing at the Arnold on behalf of BPI.

b. An immediate Temporary Restraining Order requiring Somers to remove any and all social media posts related to BPI, her appearance on BPI's behalf at the Arnold, and barring her from making any future such social media posts;

c. An immediate Temporary Restraining Order barring BPI from using Somers' face, likeness, etc., to promote its products; and

d. An immediate Temporary Restraining Order requiring BPI and Somers to destroy any and all promotional or advertising material in which Somers endorses BPI's products.

PRAYER FOR RELIEF

Plaintiff requests an award of compensatory damages in excess of $75,000; punitive damages; reasonable costs and counsel fees as provided for by contract; and injunctive relief in the form of an immediate Temporary Restraining Order barring Somers from appearing at the

Arnold on behalf of BPI, an immediate Temporary Restraining Order requiring Somers to remove any and all social media posts related to BPI, her appearance on BPI's behalf at the Arnold, and barring her from making any future such social media posts, an immediate Temporary Restraining Order barring BPI from using Somers' face, likeness, etc., to promote its products, and an immediate Temporary Restraining Order requiring BPI and Somers to destroy any and all promotional or advertising material in which Somers endorses BPI's products, plus such other relief as the Court shall deem to be appropriate.

Respectfully submitted,

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